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No. 272

In the Supreme Court of the United States

OCTOBER TERM, 1939

NATIONAL LICORICE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 867–897) are reported in 7 N. L. R. B. 537. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 907–913) is reported in 104 F. (2d) 655.

JURISDICTION

The order of the Circuit Court of Appeals was entered July 6, 1939 (R. 914–917). The petition

for a writ of certiorari was filed August 7, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the findings of the National Labor Relations Board that petitioner had violated Section 8 (1), (2), and (5) of the National Labor Relations Act were supported by evidence.

2. Whether the Board erred in ordering petitioner to discontinue its contract with the Collective Bargaining Committee, a labor organization of its employees, and certain individual contracts with the employees.

3. Whether petitioner can, and particularly at this point, contend that the order invalidating the contracts violated the rights of the Committee and the employees under the Fifth Amendment in that they were not made parties to the proceeding.

4. Whether the charge was adequate to support the complaint and order.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Sec. 151 *et seq.*) are set out in the Appendix to the petition and supporting brief, pp. 37–38.

STATEMENT

On August 2, 1937, the Bakery and Confectionery Workers International Union of America, Local 405 (hereinafter called the Union), filed with the Board's Regional Director in New York City a charge alleging that petitioner had engaged in certain unfair labor practices affecting commerce, as defined in the National Labor Relations Act (R. 772–773). On October 7, 1937, the Board, by its Regional Director, served a complaint and notice of hearing upon petitioner (R. 774–780). Petitioner, on October 11, 1937, filed a written notice of motion for a bill of particulars (R. 783–788), and on October 13, 1937, filed an answer, which, in addition to other matters not now in issue, denied that it had engaged in the unfair labor practices charged (R. 790–798).

Pursuant to notice, a hearing on the complaint was held in New York City on October 13–16 and 18–20, 1937, before a Trial Examiner duly designated by the Board. The Board, petitioner, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence was afforded to all parties. At the beginning of the hearing counsel for the Board served a bill of particulars (R. 799–801, 802–803).

On February 8, 1938, the Trial Examiner filed his intermediate report (R. 804–828), in which he

found that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (5) and Section 2 (6) and (7) of the Act. He recommended that petitioner cease and desist from those violations, and, upon request, bargain collectively with the Union (R. 826–828). Petitioner filed exceptions to the report (R. 829–837). Oral argument was granted, but subsequently waived (R. 841).

On May 31, 1938, the Board rendered its decision, setting forth its findings of fact, conclusions of law, and order (R. 867–897). Briefly summarized, they are as follows:

Petitioner, a New York corporation with plants in Brooklyn, Philadelphia, Moline, and Montreal, is engaged in the business of manufacturing and selling licorice products and confections for drug, confectionery, grocery, and allied trades. Approximately 48 percent of the raw materials used at the Brooklyn plant, which is the one here involved, are purchased from points outside the State of New York, and about 41 percent of the finished products there manufactured are shipped outside that State. The normal force at the Brooklyn plant, excluding clerical and supervisory employees, is approximately 140 men (R. 873–874). The jurisdiction of the Board is not in issue.

The findings of the Board with respect to the unfair labor practices (R. 874–892) are discussed in detail in Point I, *infra*, pp. 6–18. In summary, the Board found that petitioner, by refusing to

bargain collectively with the Union, has engaged and is engaging in an unfair labor practice within the meaning of Section 8 (1) and (5) of the Act. The Board also found that petitioner, by coercing and intimidating its employees in the exercise of their rights to self-organization and collective bargaining, and by persuading and coercing its employees to refrain from becoming members of the Union and to sign certain individual contracts of employment, has engaged in unfair labor practices within the meaning of Section 8 (1) of the Act. Finally, the Board found that petitioner, by initiating, sponsoring, and dominating a labor organization of its employees known as the Collective Bargaining Committee, has engaged and is engaging in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act (R. 893–894).

Upon the basis of those findings, the Board entered an order (R. 894–897) requiring petitioner to cease and desist: from dominating and interfering with the administration of the Collective Bargaining Committee or any other labor organization of its employees; from recognizing the Committee as the representative of any of its employees; from giving effect to its contracts with the Committee and with the individual employees; and from refusing to bargain collectively with the Union. As affirmative relief designed to effectuate the policies of the Act the Board ordered petitioner: to withdraw recognition from the Committee; to inform, in writing, the Committee and each of the em-

ployees who signed an individual contract that such contract is in violation of the National Labor Relations Act, that the employees are relieved of all obligation under them, and that respondent will no longer demand their performance; to bargain collectively, upon request, with the Union; and to post appropriate notices.

On August 29, 1938, the Board filed in the court below its petition for enforcement of the order (R. 4–12). On June 12, 1939, the court directed enforcement of the Board's order, with the exception of paragraphs I (d) and II (c), which were modified to the extent of conditioning the order to bargain with the Union upon a determination, in an election, that the Union is still the choice of a majority (R. 907–913).[1] An order of enforcement in accordance with the opinion was filed on July 6, 1939 (R. 914–917).

ARGUMENT

I

THE FINDINGS OF THE BOARD THAT PETITIONER HAD ENGAGED IN UNFAIR LABOR PRACTICES IN VIOLATION OF SECTION 8 (1), (2), AND (5) OF THE ACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

The petition for certiorari (pp. 32–36) challenges the finding of the Board that petitioner had violated Section 8 (2) of the Act in that it had dominated and interfered with the Collective Bar-

[1] Although the Board has filed no cross-petition on this issue, it does not agree that the court below was correct in thus modifying its order.

gaining Committee on the ground that the finding is not supported by substantial evidence. The specification of errors (p. 17) makes a similar attack upon all other portions of the Board's order. It may be doubted whether petitioner has in this way effectively challenged the Board's findings and order with respect to the violations of Section 8 (1) and (5) of the Act. See *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178. We shall, however, summarize the evidence relating to the violation of those sections as well as that relating to the violation of Section 8 (2), in order that a complete picture may be before the Court.

The Union began its activities at petitioner's Brooklyn plant in early July 1937, when a number of petitioner's employees there requested Galvin, the president of the Union, to assist in organizing the plant (R. 874; 43, 240). By the evening of July 14, of the approximately 140 employees within the appropriate unit (R. 39),[2] 99 had signed applications for membership (R. 875; 258, 272–275, 181, 241, 741). Each application designated the Union as the applicant's bargaining agent (R. 134). Consequently, as the Board found, on July 14, 1937, and thereafter, the Union represented a majority of the employees in the unit (R. 888).

[2] There is no controversy with respect to the appropriate unit. The Board found that the unit should include all the production employees of the company, including working foremen, but should exclude executive, supervisory and office employees, salesmen, and truck drivers (R. 887).

On the evening of July 14 Galvin sent a telegraphic night letter to petitioner, requesting that a date be fixed for a bargaining conference (R. 875; 181, 391, 858). Petitioner received the telegram on the morning of July 15 (R. 875; 605–606, 717), but did not reply to it or acknowledge its receipt (R. 875; 44, 446). Instead, petitioner's president, Sanford, called a meeting of the employees on July 16, and, reading from a prepared paper,[3] informed the employees that they were "one big, happy family," that it "was not necessary" for them to "go to an outside union," and that he would not recognize an outside union (R. 875, 299, 327, 342, 351). He then said (R. 300):

> Before I leave this room I want you to pick your own committee, and after you pick your own committee you come downstairs into my office and bargain with us.

Supervisory employees also spoke, urging the employees to accept the suggestion (R. 875, 326–330, 297–301, 349–351), but the proposal was rejected (301–305, 359).

On July 19 or 20, Galvin and Picariello, one of the trustees of the Union, called at the plant and sought a collective-bargaining conference with petitioner's officials (R. 875; 44). They brought with them a proposed agreement which had been approved by the employees, and 109 signed applica-

[3] Counsel for petitioner, although requested to do so, declined to offer this paper in evidence (R. 329).

tions (R. 875–876; 44, 258). Galvin offered to show the membership cards to Sanford, but when Sanford declared that he would not bargain with the Union even if it did represent a majority (R. 876; 144), Galvin withdrew the offer (R. 876; 45, 71, 73, 144). Sanford asserted that he had some doubt as to the identity of the Union officers, but he refused to telephone to either the American Federation of Labor or the Union offices to satisfy himself (R. 59–60, 452). The Union's proposed agreement was not discussed at all (R. 144).

On the afternoon following the visit of Galvin and Picariello, Sanford summoned to his office a group of about 14 employees who had been selected as best able to convey petitioner's views to the other employees (R. 876; 460, 626). These employees were told that "two very lovely young gentlemen who purported to be representatives of yours" had visited the plant that morning (R. 876; 459, 624). Sanford then stated that petitioner proposed to grant, beginning July 1, 1938, a 5 percent wage increase, time and one-half for overtime, and one week's vacation with pay (R. 876; 302–303), and asked the employees to contact the other workers and then come down and see him again (R. 303). The employees were dissatisfied with the offer, and it was dropped (R. 876; 305).

Shortly thereafter, Dorsey, petitioner's superintendent, selected about eight employees to circulate a petition nominating a committee to supersede

the Union as the collective bargaining representative of the employees (R. 876; 306–311, 357–361). The employees did not at first understand the purport of the petition, but as soon as they became aware of its effect they struck out their signatures and returned the petition to Dorsey (R. 876, 308–310, 356–361, 386–389). There is evidence that Dorsey was present when a number of signatures were obtained (R. 876; 309, 357–358). The petition eventually came to Healey, petitioner's assistant secretary, who destroyed it (R. 461).

On July 21 the Union filed with the regional office of the Board a petition asking to be certified as the exclusive collective bargaining agent of petitioner's production employees (R. 876; 47). A meeting of representatives of both petitioner and the Union was arranged for July 28 at the office of John T. McCann, a representative of the Board, and at that meeting, upon McCann's assurance that he was convinced that the Union represented petitioner's employees, Sanford and Healey agreed to meet with them on the following day (R. 876–877; 464–466).

Accordingly, on July 29, Galvin, Anderson, Sklar, and Picariello, representing the Union, arrived at petitioner's plant, and met with Sanford, Carpentier (a vice president), Smylie, and Healey, representing petitioner (R. 877; 49, 467). Since petitioner raises no specific challenge to the finding of the Board, approved by the court below, that the "negotiations" of July 29 did not in fact constitute

collective bargaining within the meaning of Section 8 (5) of the Act (see p. 7, *supra*), it is unnecessary to relate the events of the conference in detail. A general statement, however, will illuminate petitioner's attitude.

Sanford, reading from a prepared statement, disposed of the Union's demands one by one, characterizing them as "impossible," "impractical," "preposterous," or "unworkable" (R. 877; 52–53, 94). He then presented counter proposals similar to those made to the employees' group on July 20 (R. 877; 95–97, 100). The whole meeting was conducted in a manner designed to prevent discussion: whenever a point came up, Sanford would simply reread the passage concerning which the question was asked (R. 877; 50, 84, 147, 197–198).

Even more significant, however, was the revelation of petitioner's position with reference to the Union. Sanford stated that he would not recognize the Union as the collective bargaining agency of the employees, and would make no contract with it, but rather, as the Board found (R. 877):

> would talk with the Union representatives and ask them "to bring back the results of the conference to his employees and thereafter it would be required of his employees that they individually sign contracts with them and that he deal directly with his employees and not with the Union."

The finding was based on the clear and direct testimony of the Union representatives (R. 50, 54, 96,

105, 145, 150), and was inferentially confirmed—certainly not contradicted—by the testimony of petitioner's representatives (R. 468–470; cf. R. 159, 92). When Galvin stated that the whole course of proceedings had a familiar ring, Sanford admitted that the Brooklyn Chamber of Commerce was advising them (R. 877; 57).[4] At the conclusion of the meeting, Galvin made a request for a further conference, but no arrangements for it were made (R. 877; 112).

On August 2, Anderson telephoned Sanford and asked for a copy of the transcript of the July 29 meeting, which Sanford had promised to give the Union. Sanford informed him that the notes had been jumbled, and that the stenographer had left

[4] The reference is to the method of evading the National Labor Relations Act devised by L. L. Balleisen, of the Brooklyn Chamber of Commerce (see R. 719–721). Under the Balleisen formula the employer refuses to sign a contract with the union representing the majority of the employees, and insists instead that the contract be "executed between the company and each workman individually and not as a collective agreement with representatives of the employees, as provided by the act." *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97, 100 (C. C. A. 2d). The formula was condemned in the *Hopwood* case, *supra*, and has been held by the Board to violate the Act in a number of cases. *Matter of Atlas Bag and Burlap Co.*, 1 N. L. R. B. 292; *Matter of Cating Rope Works, Inc.*, 4 N. L. R. B. 1100; *Matter of Metropolitan Engineering Co.*, 4 N. L. R. B. 542; *Matter of American Mfg. Co.*, 5 N. L. R. B. 443; *Matter of the Jacobs Bros. Co., Inc.*, 5 N. L. R. B. 620; *Matter of Federal Carton Corp.*, 5 N. L. R. B. 879; *Matter of David E. Kennedy, Inc.*, 6 N. L. R. B. 699; *Matter of Art Crayon Co., Inc.*, 7 N. L. R. B. 102.

on her vacation (R. 878; 163, 188). Upon Anderson's request, another meeting was set for August 5 (R. 878; 163–164).

During the morning, however, petitioner's employees stopped work and gathered in the shipping room away from the machines, where they remained for the balance of the afternoon (R. 878; 312). The strike was not called by the Union, but rather was a spontaneous expression of dissatisfaction with the course of the negotiations (R. 878; 115–121, 243–244, 311–312). Although petitioner immediately called police and hired guards, there was no violence, and the employees left the plant later in the afternoon (R. 878; 316–317, 513).

Petitioner, of course, was under an obligation to bargain notwithstanding the strike, but there is convincing evidence to support the finding of the Board (R. 889–890) that it failed to do so upon request during that period. Anderson learned of the strike about 1 P. M. on August 2 (R. 878; 162–163, 167, 184). He immediately called Sanford, and offered to do anything in his power to help settle it (R. 878; 168, 223). Sanford, however, accused Anderson of having called the strike, which Anderson denied, and refused to talk with him further (R. 878; 168). Anderson then went to the plant and expressed to Healey his desire to help settle the strike. Upon inquiry he was told by Sanford through Healey that the August 5 meeting had been called off (R. 879; 169). Anderson's

appeal to the New York State Labor Relations Board was likewise without result, the Board representative stating that he had been unable to get the executives of the company to agree to meet with the Union (R. 879; 166, 171–172, 237).

Anderson also wrote to petitioner on August 2 (R. 848) asking for an immediate conference. Petitioner's answer (R. 849) announced the cancellation of the August 5 conference, and stated that no future time would be set until "we have a letter from you informing us as to whether or not this strike was instigated, ordered or approved by your Union, or any official or officials of your Union" (*id.*). Anderson did not reply, both because he had orally disclaimed responsibility, and because he was afraid a letter such as petitioner had requested would be used to alienate employees from the Union (R. 879; 219, 222, 232–233).

During the strike petitioner's hired guards ingratiated themselves with the pickets, buying them beer and lunches, and at the same time attempted to persuade them to call off the strike (R. 879–880; 320–321, 362–363, 604–605). Healey himself told the pickets that the Union was no good and a "racketeer," and that petitioner would close up and move to Philadelphia before it would recognize the Union (R. 880; 246, 251–252). These intimidating and coercive statements were in plain violation of Section 8 (1) of the Act.

On August 25, petitioner reopened the plant (R. 880, 520). On August 27 petitioner sent a

letter (R. 850) to each employee, requesting him to return to work on August 30, and stating that "all available means of protection" would be afforded. On the same day Healey, in reply to an anonymous telephone call, met one William McCann and two other employees in the Brooklyn Y. M. C. A. (R. 880; 525). The employees stated that they were anxious to return to work, and asked whether they could have their own committee and bargain with petitioner. Healey replied that if they could obtain the authorization of a majority of the employees petitioner "would be very happy to deal with them" (R. 880; 526–527).

A few days after he returned to work McCann again asked Healey about the procedure for getting together a collective bargaining committee. Healey told them he could not go into it, but to get a committee which could be demonstrated to represent a majority of the employees (R. 880; 659). On September 9 McCann again came to Healey for assistance in drawing a letter of authorization which the employees could sign. Healey refused to help, but sent him to Sanford (R. 881; 576). Sanford then dictated the form (R. 866a), designating a committee of workers as the collective bargaining representatives of the workers, and revoking any authority to any other organization. This letter was circulated among the employees by McCann, and on September 9 was presented to San-

ford and Healey with 110 signatures besides those of the members of the Committee (R. 881; 696).

Thus the Committee was instigated and promoted directly by petitioner. But even with less overt acts of sponsorship, the Committee could not be regarded as the free choice of the employees. Petitioner had shown unswerving opposition to an outside organization and a pronounced desire for an "inside" plan, and had driven its position home with unfair labor practices against the Union. An "inside" organization formed under these circumstances, as the Committee was, could not but be a response to petitioner's interference and the subject of its domination and support.

The subsequent relations of the Committee with petitioner indicate its continued lack of independence. On September 10, the Committee sought to bargain with petitioner (R. 881; 580–581). No question was raised as to its authority to represent the employees (R. 882; 698). The Committee asked what could be done about wages, and Sanford read and explained to them a contract containing the same proposals that had been offered on July 20 and July 29 (R. 882; 581–582; cf. R. 702). The Committee's only requests related to pay for holidays and a reduction of the term of the contract from 5 to 3 years, which were accepted with modifications (R. 882; 586). The contract finally agreed to required the signatures of not only petitioner and the Committee, but of the individual employees

as well (R. 882; 582). The Committee circulated copies of the contract (mimeographed by petitioner, R. 738) and the individual contracts were signed by certain of the employees and returned to petitioner (R. 882).

Several subsequent incidents reveal petitioner's domination of the Committee. For example, when Garone and 13 other employees returned to work, they asked the Committee if their group could have a representative upon the Committee. The Committee replied that they would have to see Sanford. The latter replied: "I am sorry; the committee has been picked already. There is enough right now on the committee" (R. 882–883; 761–764, 597). On another occasion Garone asked McCann, as a member of the Committee, to take up a grievance with the management. McCann refused, stating: "We can't argue for you" (R. 883; 764–765). Sanford himself told several employees that they would not get the 5 percent increase and that he would not "protect" their jobs if they did not sign the individual contracts (R. 883; 375, 381).

The violations of the Act inherent in the contracts thus executed are dealt with in Point II, *infra*. In addition to these violations, however, the foregoing summary of the Board's findings and the evidence upon which they were based makes abundantly clear that the general challenge made by petitioner to the Board's order cannot be sustained. Unquestionably, petitioner refused to bargain col-

lectively with the Union at the meetings of July 20 and 29, and thereafter during the strike. The domination, support, and interference with respect to the Committee is shown not only by the circumstances of its origin, but by the manner in which the "bargaining" with it was conducted, and by the complete lack of capacity for independent action which it demonstrated after that "bargaining." The numerous violations of Section 8 (1) of the Act also stand plainly revealed—the preliminary interference by Sanford with the free exercise of the employees' rights to select the Union as their bargaining representative, the first company-inspired but fruitless petition for an inside bargaining committee, the interference with the employees during the strike, as well as the other incidents described above. The cease and desist portions of the Board's order based upon these violations were consequently required by the Act (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265), and were properly ordered to be enforced by the court below (R. 914, 915).

II

PETITIONER WAS PROPERLY ORDERED TO DISCONTINUE ITS CONTRACTS WITH THE COMMITTEE AND WITH THE INDIVIDUAL EMPLOYEES

The discussion in Point I, *supra*, has dealt with petitioner's violations of the Act apart from the provisions of the contracts which were entered into by petitioner with the Committee and with its em-

ployees. Those contracts, the Board found, constituted violations of the Act both in their terms and in the circumstances of their making (R. 885–886). The court below upheld these findings (R. 911–912). We submit that the Board and the court below were correct.

The contracts are not of an unfamiliar pattern. Contracts of very similar character, entered into under the Balleisen formula have been considered by the Board in a number of cases (cited footnote 3, p. 12, *supra*). A similar contract was condemned, and the employer ordered to discontinue it, in *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97, also decided by the court below. The admission by petitioner that it was being advised by the Brooklyn Chamber of Commerce, with which L. L. Balleisen is connected, and the striking similarity of the contract here and that condemned in the *Hopwood* case, leave no doubt that petitioner, too, hoped to avail itself of the Balleisen "formula" to avoid its obligations under the Act.

The critical portions of the present contract are contained in paragraph Seventh (R. 854). The paragraph begins:

> Any employee has the right to join any union of his own choosing or to refrain from joining any union.
>
> * * * * *

> It is mutually understood and agreed that the Employer will not discharge Employees because of legitimate union activities conducted outside the company time or company property or because of any affiliation with any union.

We need not consider whether these provisions coincide with the rights of the employees under the Act. The general statement and the guarantee are both rendered meaningless by the provision at the end of the paragraph:

> It is strictly understood and agreed, however, that the question as to the propriety of an Employee's discharge is in no event to be one for arbitration or mediation and that any action of reinstatement, if any, will be taken voluntarily by the Employer if it deems such reinstatement advisable.

It seems fairly clear that the abstract "right" of an employee not to be discharged because he becomes a member of a union and engages in union activity is of small value if the employee not only is precluded from raising through his representatives the reason for his discharge,[5] but also is forced

[5] The court below, although it believed the provisions quoted above to be "somewhat ambiguous" (R. 911), concluded that they were meant to deny the employees the right to have their representative act for them if the reason for their discharge was in question. Its conclusion was fortified both by the provisions that a discharged employee *individually* was entitled to put his case before petitioner, and peti-

to accept the decision of petitioner on that question.

Moreover, there are further provisions in the present contracts which seriously infringe the rights of employees under the Act:

> The Employees or any of them shall not and have not the right to demand a closed shop or a signed agreement by his Employer with any union.

It is obvious that much of the inducement to union membership is destroyed if the employee is aware that the union will in no event be permitted to embody the fruits of its collective bargaining in a signed agreement.

Moreover, here it is fairly plain that the words "with any union", which appear at the end of the last sentence quoted above, are of considerable significance. Petitioner clearly has no objection to signed agreements *as such,* since it executed one with the committee and with each of the individual employees. Its objection is to signing an agreement "with any union", and its purpose, we submit, is clear—to interfere with and discourage the development of genuine union organizations among its employees.

The conclusion is inevitable that the contracts were invalid on their face because the conditions

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tioner's insistence that each employee sign the contract (R. 911–912). Indeed, the basic purpose of the Balleisen system is to make the collective bargaining committee merely a conduit through which the employer's proposals may be transmitted to the employees.

they impose violate the Act. As a consequence, the Board was under a mandatory duty to require petitioner to cease and desist from continuing to violate the Act by giving effect to them. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. Cf. *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97 (C. C. A. 2d); *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236; *United States* v. *Reading Co.*, 226 U. S. 324, 357; *Swift & Co.* v. *United States*, 196 U. S. 375, 396; *Aikens* v. *Wisconsin*, 195 U. S. 194, 205, 206; *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 465–466.

Moreover, these contracts were likewise, upon the evidence and findin[illegible] a direct consequence, indeed a medium of petitioner's domination and control of the Committee and its refusals to bargain collectively with the Union. Consequently, unless these contracts are terminated they stand as the embodiment both of illegal requirements and of illegal conduct, in direct negation of the policies of Section 7 of the Act.

The requirement in paragraph 2 (b) of the Board's order (R. 896) that petitioner inform each employee that the contracts are in violation of the Act and therefore invalid is, of course, necessary to make the cease and desist provisions of the order effective and to remove the contracts' coercive effect. *National Labor Relations Board* v. *Hopwood Retinning Co., supra.*

Petitioner contends (pp. 28–30) that the Board had no power to order petitioner to cease and desist from giving effect to these contracts in spite of their provisions and the circumstances under which they were made. Plainly, however, the decision in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, upon which petitioner relies, does not support the contention. Individual contracts certainly must not contain provisions which, like these contracts, purport to narrow the rights of the employees guaranteed by the National Labor Relations Act.

The requirement that petitioner shall cease giving effect to the contract with the Committee rests not only upon the provisions of that contract, which is identical with those between petitioner and the individual employees, but also upon the fact that such action is essential to make effective the provision of the order requiring petitioner to cease and desist from recognizing the Committee as the representative of any of its employees (paragraph 1 (b), R. 895). The Committee is not a *bona fide* labor organization, but an agency dominated and supported by petitioner in violation of Section 8 (2) of the Act. The contract is the embodiment of petitioner's illegal relations with, and is a consequence of its domination of, the Committee. It also perpetuates recognition for collective bargaining unlawfully conferred. It must, therefore, be

set aside. *National Labor Relations Board* v. *Eagle Mfg. Co.*, 99 F. (2d) 930 (C. C. A. 4th).

The contention advanced by petitioner (pp. 31–32) that *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, required a different result is plainly unsound. The Court emphasized that exactly the contrary situation was there presented—that the unions involved were national unions not under the control of the company, and that there had been no finding of violation of Section 8 (2) of the Act. 305 U. S. at 231–239. Nor were the contracts there involved invalid under the Act by reason of their terms.

III

THE CANCELLATION OF THE CONTRACTS DID NOT VIOLATE THE FIFTH AMENDMENT

Petitioner asserts (pp. 21–28) that it was deprived of due process of law with respect to the cancellation of the contracts in that (1) counsel for the Board had stipulated that the contracts were not in issue, and (2) no notice and hearing was afforded the Committee or the individual employees.

The answer to the first branch of the contention is, simply, that there was no such "stipulation". The portion of the record referred to by petitioner is as follows (R. 380–381; Mr. Mann was the attorney for petitioner, Mr. Sklar was attorney for the Union, and Mr. Graham was attorney for the Board):

Q. (By Mr. MANN.) Miss Tesoro, the amended charge says that the National Licorice Company has, by means of threats and intimidations, coerced, and attempted to coerce, its employees into signing individual contracts. In the first place, do you understand what those words mean, that I just read?—A. No.

Q. Well, "coerce" means to force.

* * * * *

Q. (By Mr. MANN.) "Intimidate" means about the same as threats. Did anybody threaten you or force you to sign this contract?—A. No.

Mr. SKLAR. Objected to, Mr. Examiner, on the ground that this charge applied to August 2nd and has nothing to do with the contract of September 20th.

Mr. MANN. It talks about individual contracts, and they offered in evidence a contract.

Mr. SKLAR. Those contracts referred to are the ones mentioned by Mr. Sanford on July 29th.

Mr. GRAHAM. In order to get the right effect, we are going to let these in. Complaint embodies none of these contracts.

Mr. MANN. May I ask on the record whether they want to go into this question of contracts under their amended charge? If not, let's forget about it.

(482) Trial Examiner KOREY. I have ruled you can ask the question. Please continue.

We submit that petitioner's counsel could not possibly have regarded this colloquy as a stipulation that the contracts were not in issue. The statement by Mr. Graham that "Complaint embodies none of these contracts," which is the only remark made by counsel for the Board upon which petitioner relies, is certainly far from a stipulation that the contracts were not to be considered thereafter. Moreover, petitioner's counsel immediately called for an interpretation of Mr. Graham's remark, and was told by the Trial Examiner that he could continue to pursue his line of questioning designed to prove the contracts to be valid, as petitioner had expressly alleged in its answer (R. 795). Finally, petitioner's counsel himself *thereafter* called Healey, an officer of petitioner, to prove their validity (R. 563–733). The conclusion is irresistible that petitioner was not in fact misled.

The second branch of the contention, that the Committee and the individual employees were entitled to notice and hearing, need not be discussed in detail, since the contention is plainly not open to petitioner in the present case.

Section 10 (e) of the Act, in providing for judicial review of Board orders, specifically states:

> No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. . . .

The objection which petitioner seeks to raise was not urged before the Board. Even in its exceptions to the Trial Examiner's report petitioner objected to the recommendations that it give notice of discontinuance of the contracts solely upon the ground that (R. 835)—

> said recommendations are contrary to law, and are not supported by the evidence adduced upon the hearing.

Not until the briefs were filed in the court below did petitioner raise the point.

The statute bars a belated objection of this character, which could easily have been obviated by the Board had the matter been timely raised. *Newcomb* v. *Wood*, 97 U. S. 581; *United States* v. *Atkinson*, 297 U. S. 157; *National Labor Relations Board* v. *National Motor Bearing Co.* (C. C. A. 9th), decided June 2, 1939.

Moreover, it is plain that so far as petitioner is concerned, there has been no lack of due process. It had proper notice and hearing. That is the limit of petitioner's interest. This Court stated in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 558:

> The railroad can complain only of the infringement of its own constitutional immunity, not that of its employees.

See also *Erie Railroad Co.* v. *Williams*, 233 U. S. 685, 697; *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571, 576. The decision in *Consolidated Edi-*

son Co. v. *National Labor Relations Board,* 305 U. S. 197, is not to the contrary. In that case the unions whose rights were claimed to have been infringed by the failure of the Board to serve them had themselves intervened and asserted those rights in the Circuit Court of Appeals and in this Court.

Even were the point open to petitioner, it may be noted that the contracts here, unlike those involved in the *Consolidated Edison* case, were with numerous individuals and an organization through which the individual contracts were made, which "the employer had created and fostered * * * and dominated * * * in violation of § 8 (2)" (305 U. S. at 233).

IV

THE CHARGE WAS FULLY ADEQUATE TO SUPPORT THE COMPLAINT AND ORDER

There is no merit in petitioner's contention (pp. 18–20) that the decision below, insofar as it holds the charge filed sufficient to support the complaint and order, is in conflict with the prior decision of the same court in *National Labor Relations Board* v. *Hopwood Retinning Co.,* 98 F. (2d) 97. Were there any conflict, the present decision would, of course, control. But in fact there is not the slightest conflict. In the *Hopwood* case the charge filed with the Board alleged unfair labor practices only by the Hopwood Retinning Company, but the complaint was issued both against that company and against Monarch Retinning Company, another

corporation. The Board's order ran in terms against both companies. The court below ruled that the filing of a charge against Monarch was prerequisite to valid issuance of a complaint against that corporation. In the present case petitioner's objection goes not to the existence of a charge against it, but to the content of the charge.

Petitioner contends that the charge (R. 773) is not broad enough to support the order requiring discontinuance of the contracts. Laying to one side the general question whether a complaint of the Board must be confined strictly to previous matters stated in the charge, the charge in this case was filed before the Committee had been formed and long before the contracts were entered into. The opinion of the court below is a complete answer to the contention that under those circumstances the Board could not take action with respect to the contracts. After adverting to its prior decision the court stated (R. 913):

> * * * we need not consider here how far it [the *Hopwood case*] confines the proceeding to matters then existing, but not included. For here no "charge" could have included the company union and it was not necessary that it should. The original controversy had resulted in a strike; the strike had failed; the company union followed on the failure; and the Board was within its powers in treating the whole sequence as one, and in reestablishing the workmen's freedom, by ending the company union's privilege to represent them.

CONCLUSION

Wherefore, it is respectfully submitted that the petition for certiorari should be denied.

ROBERT H. JACKSON,
Solicitor General.

CHARLES A. HORSKY,
Special Attorney.

CHARLES FAHY,
General Counsel,

LAURENCE A. KNAPP,
Assistant General Counsel,

MORTIMER B. WOLF,
Attorney,
National Labor Relations Board.

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